IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-225

PATROCINIA L. VDA DE RODULFA AND JULIANA CAPARAS VDA DEL ROSARIO, *Petitioners,*

v.

UNITED STATES OF AMERICA AND DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS AFFAIRS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS TO MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTORY STATEMENT

Insofar as the petition for certiorari deals with amended 211(a), it rests on two basic contentions. First, that on its face, the plain language of the section

did not deprive the lower court of jurisdiction and that court's holding to the contrary resulted in petitioners being deprived of their day in court and, *a fortiorari,* of due process of law. Second, that if Section 211(a) is deemed to apply to the facts of this case, then the rule of *McCullough* v. *Virginia,* 172 U.S. 102, requires the finding that Section 211(a), as applied below, is unconstitutional in that it divests petitioners' court-appointed attorneys of their court-awarded fees without due process of law.

The respondents have made the attorneys the real parties in interest since only the awards for attorneys' fee—not the primary judgments—were appealed. Their attempt to deal with petitioners' first contention is contained in footnote 3 on page 4 of the memorandum in opposition. That footnote misstates petitioners' position because petitioners do not rely on a distinction between "restoring forfeited benefits" and "decisions of the Administrator". Respondents' contentions with respect to petitioners' second basic argument are based on two cases which are inapposite and respondents made no reply whatsoever to petitioners' points IV and V.

Instead of meeting the constitutional issues head on, respondents have attempted to create the illusion that this case only involves fees for two attorneys; that federal law prohibits payments of such fees in any event;[1] that there are no constitutional infirmities in the decision below and that the issues raised will not recur. These contentions are discussed below.

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[1] The Court of Appeals did not reach this issue nor the subsidiary question of the reasonableness of the awards. However, at least 10 district court judges, after full briefing and argument, have decided these points against the respondents.

I

PETITIONERS HAVE BEEN DENIED DUE PROCESS OF LAW

Nothing in the express language of amended Section 211(a) will support a finding that the district judges' discretionary authority to award attorneys' fees[2] to the successful petitioners' attorneys is encompassed by the statutory language "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . .". By its holding that this language applied, the lower court erroneously held that the district judges' award of fees were decisions of the Administrator. They were not. The decisions were purely judicial acts. Thus, petitioners were denied their day in court and thereby denied their rights to due process of law.

II

McCULLOUGH v. VIRGINIA, 172 U.S. 102

Respondents did not challenge petitioners' assertion that the decision below is in *direct conflict* with *McCullough* v. *Virginia*.[3] Instead, respondents cited *Smallwood* v. *Gallardo,* 275 U.S. 56, 62 and *United States* v. *Schooner Peggy,* 1 Cranch 103, for the proposition that amended Section 211(a) could constitutionally divest petitioners of their attorneys' fees which had been vested by a judgment. Neither case stands as authority for that proposition.

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[2] The inherent authority of district judges to award attorneys' fees as well as the nature of attorneys' charging liens is discussed in *Hanna Paint Manufacturing Co.* v. *Rodey, Dickason, Sloan, Akin & Robb,* 298 F.2d 371 (10th Cir. 1962), where one-third of net recovery was allowed as attorneys' fees in a Miller Act case.

[3] See also: *Pacific M.S.S. Co.* v. *Joliffe,* 2 Wall. 450 (1865); *Coombes* v. *Getz,* 285 U.S. 434 (1932); and *City of Memphis* v. *Brown,* 97 U.S. 294 (1878).

The *Gallardo* cases were a series of suits brought against *Gallardo,* treasurer of Puerto Rico, to restrain him from collecting certain taxes imposed by the laws of Puerto Rico. In one of the cases, *Gallardo* v. *Santini Fertilizer Co.,* 16 F.2d 368 (1st Cir. 1926), reversed, 275 U.S. 62 (1927), the district court granted a permanent injunction on March 31, 1925. On appeal the First Circuit reversed but several months later, on December 18, 1926, the court set aside its order and transferred the case to the Supreme Court, the only Court then having appellate jurisdiction of controversies involving the application or construction of the federal constitution. On March 4, 1927, Congress passed an act which provided that no suit to restrain the assessment or collection of taxes "shall be maintained in the district court of the United States for Porto Rico." On these facts, this Court, after argument on the merits, decided that the Act of March 4, 1927 deprived all courts of jurisdiction and it ordered the suit dismissed for want of jurisdiction. This ruling was explained in another of the series, *Smallwood* v. *Gallardo,* 275 U.S. 56, at 61-2, where this Court held that there is no vested right to an *injunction* against collecting illegal taxes, that the Act of March 4, 1927 did not affect previously valid contract rights; and that the taxpayer, under the Act, was not "left without power to resist an unlawful tax", i.e., he could pay under protest and sue for return (See: 16 F.2d at p. 546-7). Here, if petitioners cannot enforce their equitable charging liens against the fund being withheld from the widows' awards by respondents, then they have been left without recourse. If this remedy is destroyed so is the right.

United States v. *Schooner Peggy,* 1 Cranch 103 (1801), does not help respondents. It held that a ves-

sel could not be condemned where specifically prohibited by a treaty which became effective before the vessel had been definitely condemned. In addition, there was no vested interest because there was a direct appeal from the judgment. Here, the primary judgments which formed the roots of petitioners' charging liens have become final. Moreover, the *Schooner Peggy* case states "If the law be constitutional . . . I know of no court which can contest its obligation." In the instant case the constitutionality of Section 211(a) is seriously questioned.

III

MUCH MORE THAN ATTORNEYS' FEES ARE INVOLVED

Petitioners understand that respondents—if they win this case—do not propose to pay the sums withheld as attorneys' fees to the widows who obtained the final judgments. Respondents have indicated they will shield themselves from having to make such payments by saying they have obtained an act of Congress to avoid paying anyone, either the attorneys or the plaintiffs.[4] Surely, if respondents prevail, their position will require litigation of the identical issues presented here by the widows in every one of the nearly two hundred cases[5] which have been abated pending final decision of this case.

The Court below stated "counsel have not undertaken to identify any constitutional impediment" to application of Section 211(a) as construed by the Court of Appeals. The record shows that a serious constitutional issue was raised and rejected by the Court (App. 30a-31a). Thus, petitioners do not—as respondents

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[4] This statement of respondents' position was set forth at page 7 of the petition for certiorari and not denied by respondents.

[5] See appendix to petition, pages 46a-59a.

contend at page 6 of their memorandum, agree that there is no constitutional infirmity in amended Section 211(a) and petitioners rely on *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Wheeler* v. *Montgomery,* 397 U.S. 280 (1970); *Richardson* v. *Perales,* 402 U.S. 389 (1971); *Richardson* v. *Belcher,* U.S. , 30 L.Ed. 2d 23, 92 S.Ct. (1971); *Bell* v. *Burson,* 402 U.S. 535 (1971) and *Wisconsin* v. *Constantino,* 400 U.S. 433 (1971). In substance, the rule of these cases is that procedural due process must be accorded persons receiving statutory benefits before such benefits can be cut off. This issue is ripe in each of the nearly two hundred pending cases as well as in thousands of other cases where widows' and dependents' benefits have been forfeited without the elementary rudiments of due process. Therefore, it is certain that respondents erroneously concluded that the issues raised here will never recur.

CONCLUSION

In *Goldberg* v. *Kelly,* this Court held that relief payments to the poor may not be terminated without a hearing and in *Wisconsin* v. *Constantino,* this Court held that one may not by state action label one an alcoholic without a due process hearing.

Now, the Court is asked to protect the right to counsel in civil cases involving federal rights and privileges. The district judges saw fit to appoint counsel and when they succeeded, the judges rewarded them with fees from the funds they created. The issue is not really judicial review of acts of the Veterans' Administration but the right of attorneys to survive economically and to function successfully at the command of the bench. The respondents seek to deny that right by obtaining and citing a new statute which

nowhere asserts a denial of the right of the courts to command and compensate the members of the bar. The petition for certiorari should be granted for the reasons above stated and to assure the effective rights to counsel and the protection of the legal profession.

Respectfully submitted,

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